"7. That the court erred in holding that the different options or agreements under which the mines were admitted to be sold, were separate and distinct transactions, each taking place at the termination of the other.

"8. That the court erred in holding that the contract under which the mines were ultimately sold was not an extension of the original contract made with Chapin.

"9. That the court erred in not holding that appellee's contract with Chapin was for services already fully performed, the benefit of which Chapin's estate received; and that in consequence Chapin's estate was indebted to appellee for the amount of which judgment was rendered in the lower court"

Argument.

The first four assignments of error could probably have been consolidated into one, and for that reason we will discuss them together and not separately.

The finding of the Supreme Court of Arizona is conclusive of the fact that none of the evidence given at the trial of the case in the District Court was preserved and carried to the Supreme Court of Arizona, except that contained in the bill of exceptions. The finding of the Supreme Court of Arizona is also conclusive of the fact that this bill of exceptions did not state that it contained all the evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Supreme Court of Arizona for its decision. The finding of the Supreme Court of Arizona is also conclusive of the fact that it does not "otherwise appear from the record in the case that all of the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona" (Transcript of Record, pp. 71-72).

The Supreme Court of Arizona erred in reviewing the case upon the evidence and reversing the judgment in the ab-

sence of a showing that all of the evidence in the case was before it.

> "In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we can not presume for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did."

U. S. vs. Copper Queen Consolidated Mining Co., 185 U. S., 495; 46 Law, Ed., p. 1008.
Russell vs. Ely, 2d Black, 575, L. Ed., Vol. 17, p. 258.
Gardner, Treasurer, vs. Babcock, 3d Wallace, 240, Law Ed., Vol. 8, p. 31.
Texas Pacific R. Co. vs. Cox, 145 U. S., 593, Law Ed., 36, p. 829.

Statements of fact must affirmatively show that they contain all the evidence, and bills of exception must likewise show that they contain all the evidence necessary to determine the point in controversy.

> "In short, every matter not otherwise made, by statute, a matter of record, must be made so by a statement of facts or bill of exceptions, if we are required to review such matter."

Putnam vs. Putnam, 3 Arizona, 182, reported in Vol. 24, Pacific Reporter, page 320, as Southerland vs Putnam.

> "If the paper is to be considered as a statement of facts, it should state that it contains all the facts admitted, and the evidence admitted to have been proven, and the evidence of the facts disputed. No such state-

ment is contained therein. We conclude this is not good as a statement of fact."

Territory vs. Flores, 3 Ariz., page 215, 77 Pacific, p. 491.

This last case considers a document to ascertain whether or not it is a bill of exceptions or statement of facts, or either. These rules of law are recognized in other Arizona decisions, noticeably Paul vs. Cullom, Second Arizona, p. 16; 8 Pacific, p. 187; Evans vs. Glenecross, 4 Ariz., 222; 36 Pacific, 212.

The statutes of Arizona provide that the evidence taken in a trial of a case be made a part of the record by a statement of fact or by bill of exceptions, and further provide that

"The bill of exceptions may contain all the evidence, or so much thereof as may be necessary to explain the exceptions, and if all the evidence, or sufficient thereof to explain the exceptions, is contained in the bill of exceptions, no statement of fact shall be necessary."

Statutes of Arizona, year 1901, page 458, Par. 1460.
Statutes of Arizona, year 1901, page 458, Par. 1459.

The converse is, no doubt, true that a statement of fact shall be necessary in case the bill of exceptions does not contain all the evidence, or sufficient thereof to explain the exceptions.

Where the bill of exceptions does not purport to give all the evidence, the proof will have been presumed to have been supplied unless the error is affirmatively shown.

Evans vs. Glenecross, *supra*, 4th Ariz., 222.

"When the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence."

Paul vs. Cullom, *supra,* Second Ariz., p. 16.
Territory vs. Clanton, 3 Ariz., p. 1, 20 Pacific, p. 94.

"As the applicant, however, has omitted to preserve the evidence in this regard, and as it is not before us, we must assume in any event that this evidence was sufficient to sustain the finding of the court that a proper location notice has been duly filed and recorded."

Score vs. Griffin (Ariz.), 80 Pacific, p. 331.

"Where the record does not affirmatively purport to contain all the evidence, a state of facts will be presumed proved in the trial court authorizing the rulings, verdict and judgment."

Ency. Pleading and Practice, Vol. 2, p. 441.

This quotation from the Encyclopedia of Pleading and Practice cites, in its support, from one to twenty-five cases in each of the following States: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, and Wisconsin.

"The findings of fact by the trial court are presumptively correct, and if the record on appeal does not contain all the evidence, the appellate court will not review them. It will be presumed that sufficient evidence to support the findings was legally admitted."

Ency. Pleading and Practice, Vol. 2, page 486.

This quotation from the Ency. of Pleading and Practice cites, in support of it, from one to thirty cases from the following States: Alabama, Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Washington and Wisconsin.

> "Where the evidence is not all in the record, its sufficiency can not be reviewed."

American Digest, Century Edition, Vol. 3, Col. 680, Sec. 2911, citing from one to fifty or more cases from the States of Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin.

> "The sufficiency of the evidence can not be considered on appeal where the record does not affirmatively show show that it contains all the evidence."
>
> American Digest, Century Ed., Vol. 3, Col. 702, Section 2916.

This quotation from the American Digest citing from one to fifty or more cases from Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska,

Nevada, New York, Ohio, Oregon, South Dakota, Tennessee, West Virginia and Wisconsin.

Texas Pacific R. Co. vs. Cox, *supra,* 145 U. S., 593, 36 L. Ed., 829.
Hansen vs. Boyd, 161 U. S., 397, 40 L. Ed., 747.
Eliotts Appellate Procedure Digest, 773-4, Section 823.

This refusal of courts to review the findings of the lower court unless the record affirmatively shows that it contains all the evidence in the case, or all of the evidence bearing upon the findings, is so well established, and upon such sound reasoning, that it can not be presumed that a court of the standing and dignity of the Supreme Court of the Territory of Arizona, would disregard it. We feel confident that the Supreme Court of the Territory of Arizona did not intend to disregard it, but was misled into the belief that the record did affirmatively show that it contained all the evidence bearing upon the findings.

We think that part of the findings of the Arizona Supreme Court were intended to show that the said court had, when rendering its decision, been erroneously led into the belief that the bill of exceptions contained all the evidence, and that when two years after it was too late to correct its judgment, it discovered its error, and framed a finding to set forth the fact that its action was caused by a statement which it quotes, and which was contained in a paper that was not a record of the court, but which pretended to be an *ex parte* transcript of the record. The Supreme Court of Arizona, using language that could not be misunderstood, finds as a fact that "The only statements of fact in the record were contained in the foregoing findings of fact, and in a bill of exceptions. The said bill of exceptions, which was transmitted to the Supreme Court of Arizona with the record in this case, did not state that it contained all the

evidence which was introduced upon the trial of the case in the District Court, nor upon the points presented to the Arizona Supreme Court for its decision, nor does it otherwise appear from the record in the case that all the evidence which was introduced upon the trial of the case in the District Court was before the said Supreme Court of Arizona."

The court, continuing this finding, then finds that

> "The abstract of the transcript which contained the evidence stated that 'the defendant by his bill of exceptions which contained all the evidence taken on said trial, and which is as follows:' then follows the bill of exceptions, reciting the testimony of the different witnesses, covering some twenty-three pages," etc.
>
> Transcript of Record, page 71.

These latter facts thus found by the Arizona Supreme Court could under no circumstances have a place in this record unless they were introduced as an explanation for the reason the court erred in reversing the findings of the lower court.

The title "Abstract of the Transcript" is a misnomer. There is no such name for a document on appeal contained in the laws of Arizona, or the rules of its Supreme Court, but the rules of its Supreme Court provide for "an Abstract of Record." Rules of the Supreme Court of Arizona, approved March 20, 1903 (71 Pacific, VI).

The previous rules of the Arizona Supreme Court had also provided for an "Abstract of Record," and the document thus provided for is frequently called an Abstract of the Transcript. It is a document prepared by the attorney for the appellant for the convenience of himself and the Supreme Court, and its contents have no more binding force upon the court or opposite counsel than any statement contained in the counsels' brief.

Rules of the Supreme Court of Arizona (*supra*).

As shown by the foregoing findings of the Arizona Supreme Court, counsel for Appellee Trickey, in preparing his Abstract, caused to be inserted into it, just preceding the transcription of the "bill of exceptions," the statement that "the defendant by his bill of exceptions, which contained all the evidence taken on said trial." This statement the Arizona Supreme Court, in the first part of the findings above referred to, declares is not borne out by the record, but that on the contrary there is nothing in the record to show that it contains all the evidence which was introduced upon the trial of the case in the District Court.

Following the finding above referred to, the court further finds that the bill of exceptions was presented to the Judge of the District Court, and to Appellant Crowe's attorneys, and that the said attorneys made no objection thereto, "but that the record contains no certificate from the clerk or court that the evidence contained in the bill of exceptions constituted all of the evidence taken on the trial in the lower court, and that fact is controverted by the counsel for the appellee."

Transcript of Record, pages 71 and 72.

The presentation of the bill of exceptions to the opposite attorneys is provided for by our Statutes.

Revised Statutes of Arizona, year 1901, page 458, Paragraphs 1467-1468.

But there is no provision of law that this submission to the opposite attorneys waives any objection the attorneys may desire to make to it on the score that it does not contain all the evidence, nor is there any presumption or reason for holding that this submission to the opposite attorneys cures any such defect in a bill of exceptions. Were

it a statement of facts, there might be ground for such an argument. It is a settled rule of practice that bills of exception are presumed not to contain all the evidence.

> Grand Trunk Ry. Co. vs. Ives,, 144 U. S., 408, L. Ed. Vol. 36, page 485 (488).

"The rule which we have often stated is that this court will not disturb the findings of the district court as to the facts if there is any evidence fairly tending to support them."

> Abernathy vs. Reynolds, 71 Pacific, 914 (Ariz.)
> Curtis vs. Boquillas L. & C. Co., 71 Pac., 924 (Ariz.).
> Costello vs. Friedman, 71 Pacific, 937 (Ariz.).
> Edwards vs. Simms, 71 Pacific, 902 (Ariz.).
> Charoleau vs. Shields and Price, 76 Pacific, 821 (Ariz.).
> Score vs. Griffin, 80 Pacific, 331 (Ariz.).
> McCormick, *et al. vs.* Ariz. Central Bank, 52 Pacific, 469 (Ariz.).
> Weber vs. Kastner, 53 Pacific, 207 (Ariz.).
> Greene vs. Miller, 73 Pacific, 399 (Ariz.).
> White vs. Brash, 73 Pacific, 445 (Ariz.).
> Howard vs. Perrin, 76 Pacific, 460 (Ariz.).
> Ryder vs. Leach, 77 Pacific, 490 (Ariz.).
> Goldman vs. Sotello, 60 Pacific, 696 (Ariz.).

It will be seen from an examination of the dates upon which these decisions were rendered that it was not intended by the Supreme Court of Arizona that the case of Crowe vs. Trickey should change this rule, for the decisions in the first four cases just above cited were rendered upon the same date that the decision in the Crowe vs. Trickey case was rendered, viz.: The 20th day of March, 1903. The

fifth case (Charoleau vs. Shields and Price) was decided May 7, 1904, and the sixth case (Score vs. Griffin) was decided March 30, 1905. All, or nearly all, of the remaining cases were decided before the case of Crowe vs. Trickey.

From the foregoing authorities, we feel justified in arguing that there is no question but that it is the rule in Arizona that a bill of exceptions or statement of facts must affirmatively show that it contains all the evidence in the case, or the Supreme Court of Arizona will refuse to review the case upon questions of fact. It is apparent that the Supreme Court in this case did review the findings of the District Court, in the absence of a showing that all the evidence was before the Arizona Supreme Court; that it was led into believing all the evidence was before it by a statement of counsel for appellee Trickey that was not and could not be made a part of the record, so as to have any binding force or effect upon the court, and that the Arizona Supreme Court erred in reviewing or disturbing the findings of the District Court upon the record before it in this case.

Assignment of Error No. 5.

This assignment is directed to the action of the Supreme Court of Arizona in making findings of facts that had the effect to exclude from the case relevant evidence, which was contained in the bill of exceptions, and the larger part of which had been admitted by the District Court without any objection having been made to its admission. We can not find in the record any explanation of this action of the Arizona Supreme Court, and must conclude that in fact it also resulted from an oversight. The first conclusion of law of the Arizona Supreme Court contains the first of these objectionable findings. The conclusion is as follows:

"That the trial court erred in finding as a fact that plaintiff, Crowe, between the 8th day of February, 1898, and the 11th day of January, 1900, brought about a sale of Chapin's interest in the mine, because there was no evidence to sustain such finding."

Transcript of Record, page 73.

The objectionable finding is contained in the language: "because there was no evidence to sustain such finding."

The effect of this finding is to exclude from the case, not only the evidence not in the record, but also to exclude a large amount of positive evidence given by the witnesses in the case, and contained in the bill of exceptions, such as:

"Q. Mr. Crowe, what did you do toward bringing about the sale of the interest of Jerry Neville and N. H. Chapin in the Pride of the West mine? A. I secured the purchasers for the mine—Emerson Gee and A. R. Wilfley."

Transcript of Record, page 44.

"Mr. Crowe brought about the sale of the Pride of the West mine, and it was due to his efforts that the sale was effected."

Transcript of Record, page 46.

"Mr. Chapin agreed with Mr. Crowe that ten per cent was to be paid to Mr. Crowe for bringing about the sale."

Transcript of Record, page 47.

"I would not attempt to repeat all that was said at this conversation, but the proposition was made by Mr. Crowe and agreed to by Mr. Chapin, that he was

to receive ten per cent. of the amount of the sale price agreed upon."

Transcript of Record, page 47.

"I consider the services of Mr. Crowe in bringing about the sale of the Pride of the West mine worth the amount claimed for the Chapin and Neville interest and the amount he received from Olsen."

Transcript of Record, page 48.

"The plaintiff, George W. Crowe, knowing that a change in the terms of purchase was liable to be made, had an agreement with Norman H. Chapin, in the presence and hearing of myself on the dump of the Pride of the West Mine, on or about the 30th day of March, 1899, as follows: Mr. Crowe stated to Mr. Chapin and myself that in as much as the conditions of purchase were about to be changed, it was understood and agreed by and between Mr. Chapin (who also represented Neville) and the said Crowe that in any deal made with myself and Gee by him and Neville, that the said Crowe was to receive ten per cent, of any and all purchase money, as commission in negotiating the sale of their interest in the Pride of the West mine. In reply to this statement, Chapin stated to Crowe that that was his understanding; that the said Crowe was to have and receive ten per cent. of any and all purchase money to be received by him for their interest in the Pride of the West mine, as a commission for making the sale."

Transcript of Record, pages 49-50.

"George W. Crowe arranged and brought about the sale or option of the Pride of the West mine, as stated before."

Transcript of Record, page 50.

"The sale was perfected on the terms and conditions, as before stated, with permission to mine and ship ore by the payment of royalty. At the end of this year Chapin and Neville had died, and I made an agreement with the administrators to extend the time with the privilege of making partial payments. At the present time, $50,000.00 has been paid, leaving $50,000.00 still due. The only change from the original terms was an extension of time and partial payments and no Royalty."

Transcript of Record, page 51.

"I do not remember the exact words, but do remember that it was a clear understanding between Mr. Crowe and Mr. Chapin and myself that Crowe was to receive ten per cent commission on any money I might pay to Mr. Chapin."

Transcript of Record, page 51.

The foregoing extracts are taken from the evidence of appellant Crowe and two of his witnesses, viz.: Emerson Gee and A. R. Wilfley. The testimony of these two witnesses was given by deposition, and the last payment of $25,000.00 to the estates each of Neville and Chapin was made after the evidence in the depositions was given.

The evidence in the bill of exceptions also shows that immediately upon the consummation of the first agreement, Wilfley took possession, and up to the time of the trial of the case had continued in possession, constantly operating it.

"The mine has been operated steadily since we acquired possession of it, and is now being worked with a force of about fifty men. A mill and smelter have been erected, and are in operation steadily. Over a thousand feet of shafts, winzes, and up-raises have been driven in the mine. Tramways and roads have

been constructed, and the mine is now being equipped with a hoisting plant and machine drills."

Transcript of Record, page 47.

(See Transcript of Record, page 52.)

And appellee, Trickey, himself, testified as follows:

"Mr. Wilfley was in possession of the Pride of the West mine at the time I became administrator, and has been in possession ever since. Mr. Wilfley and the company have had possession right straight along. I knew, as everybody knew, that they had an option to purchase the mine and was working it, and a copy of the lease I found among the papers."

Transcript of Record, page 54.

As before suggested, most all of this evidence was admitted without objection, and it, and much more not quoted, is all a direct and positive refutation to the findings of the Arizona Supreme Court now being discussed. As a matter of fact, we can suppose that the Arizona Supreme Court made a mistake and overlooked this evidence; as a matter of law, there seems nothing left but to presume that the Supreme Court of Arizona excluded it.

The second conclusion of law of the Arizona Supreme Court made a similar objectionable finding. The conclusion is as follows:

"That said court erred in finding as a fact that the said A. R. Wilfley paid to the said defendant as such administrator, for the interest of the said Chapin, the sum of fifty thousand dollars ($50,000), as follows: April 7, 1900, $500.00; June 19, 1900, $4,500.00; September 19, 1900, $5,000.00; December 19, 1900, $5,000.00; March 25, 1901, $5,000.00; June 17, 1901,

$5,000.00; December 7, 1901, $5,000.00, because there was no evidence to sustain such finding."

Transcript of Record, page 73.

The bill of exceptions shows that the appellee Trickey at the trial of the case in open court, admitted the receipt of the said sums of $500.00, $4,500.00, $5,000.00, $5,000.00, $5,000.00, $5,000.00, and $25,000.00.

Transcript of Record, page 53.

The appellee, Trickey, himself, testifies that he received these sums as administrator.

Transcript of Record, page 53.

If the finding of the Supreme Court of Arizona is meant to indicate that Trickey received the said sums for the interest of the estate of Chapin, as distinguished from "for the interest of the said Chapin," then the numerous extracts from the evidence we have above quoted will show that there was evidence to sustain the findings of the district court, and that, while as a matter of fact the Arizona Supreme Court may have overlooked it, as a matter of law, it must be considered to have excluded it.

Assignments of Error VI, VII, VIII and IX.

An extension of time was given in which to file the findings of fact of the Supreme Court of Arizona in this case, and they were not filed until May 10, 1905. The assignments of error had to be filed on or before March 15, 1905. In consequence, they were made and filed before the findings

of fact, and could not and did not meet the findings as nearly as might be wished. As assignments of error 6, 7, 8, and 9 assert that the Supreme Court of Arizona erred in certain holdings on the evidence, this court will probably not consider them.

If this court could review all the evidence contained in the bill of exceptions, even though it does not contain all the evidence given at the trial, we believe it would find that it abundantly supports the findings of the District Court, and that the preponderance and weight of the evidence supports the findings of the District Court as against those of the Supreme Court.

We feel that the Supreme Court of the Territory of Arizona has erred in reviewing this case upon the facts, in reversing the judgment, and in ordering judgment entered for the appellee, and it is submitted that these errors of the Supreme Court of Arizona are apparent from the record. We ask that the judgment of the Supreme Court of Arizona be reversed.

Respectfully submitted,

W. C. KEEGIN,
Attorney for Appellant.

F. H. HEREFORD,
S. E. HAZZARD,
Of Counsel.